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Mr. Newton Tedder
US EPA – Region 1
5 Post Office Square
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Mail Code OEP06-4
Boston, MA 02109-3912

Re: Comments By Atkinson, Kingston, Newton, and Plaistow, NH Regarding the Environmental Protection Agency Region 1's Draft Small Municipal Separate Storm Sewer System NPDES General Permit – New Hampshire

Dear Mr. Tedder:

On behalf of the New Hampshire towns and municipal separate storm sewer system ("MS4") operators of Atkinson, Kingston, Newton, and Plaistow, NH ("Represented Towns")[1], I submit the following comments regarding the Environmental Protection Agency Region 1's Draft Small Municipal Separate Storm Sewer System NPDES General Permit – New Hampshire ("Draft MS4 Permit")(78 Fed. Reg. 9,908; February 12, 2013).[2] Each of the four Represented Towns has standing to file these comments as individual operators of MS4 systems potentially subject to the Draft MS4 Permit.

As set forth in the comments below, the Draft MS4 Permit must undergo significant modification to address provisions that are inconsistent with Region 1's Clean Water Act authority, are arbitrary and capricious, or simply cannot be justified from a cost-benefit perspective under EPA's current stormwater permit program. In addition to raising the legal, technical, and economic shortcomings contained in the Draft MS4 Permit, these comments also provide input and possible solutions to those issues in its attempt to assist Region 1 in developing an appropriate MS4 permit without continued delay or protracted litigation.

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[1] In addition to being represented in this matter by Barnes & Thornburg LLP, each of the four Represented Towns also has retained Sumner Kalman, Attorney at Law, PC, to help serve as the Town's general counsel and who also participated in developing these comments. These comments are being submitted as a single set of comments to help reduce the administrative burden on EPA Region 1 staff, but EPA should consider each Represented Town as a unique public participant in this administrative process with all of the legal rights and standing as if these same comments were filed individually by each Represented Town.

[2] The original comment period was extended through August 15, 2013. *See* 78 Fed. Reg. 27.964 (May 13, 2013).

Background Regarding Atkinson, Kingston, Newton, and Plaistow, New Hampshire

Atkinson, NH: Atkinson is a quiet bedroom community located in southeastern New Hampshire with a population of just over 6,700. Its winding roads are both historic and beautiful. Conveniently located between Boston and Concord, its residents enjoy country living with easy access to shopping, urban areas, the lakes region and the mountains.

The EPA Region 1 stormwater general permit for small municipal MS-4's raises real concerns. Other than the police department and library, Atkinson has only three (3) full time employees, all with administrative focus. The town would have to hire contractors at significant cost to meet the requirements of the permit, placing a significant burden on the Town and its residents. EPA's Draft MS4 Permit represents an increase in administrative, financial and technical effort that would be impossible for our municipality to absorb.

Kingston, NH: Kingston is a southern New Hampshire town of approximately 6,100 residents and 20.9 square miles, including 1.2 square miles of inland water area. The bodies of water include several Great Ponds (ponds having areas greater than 10 acres) including one that is encompassed by a State Park (Kingston State Park). The town is fortunate to have a substantial aquifer resource comprising approximately two-thirds of its land area, and local ordinances have been in effect for more than two decades to protect that resource with minimum lot sizes, restrictions on use, special septic design regulations, etc. Approximately 95 percent of the town's funding is realized through property taxes.

A long-time conservation effort has set as a goal – included in the town's Master Plan – the preservation/protection of 25 percent of the town's area. To that end, conservation easements or protective covenants have been recorded against more than 2,500 acres and funds have been set aside to purchase more. That portion of the town that is included in the Great Bay Watershed is nearly all under protection. The Town actively participates in the Southern N. H. Watershed Alliance that, in cooperation with the N. H. Department of Environmental Services, works to develop protections for the Watershed through regulation and education. The Town strives to regulate adverse impact on groundwater and coastal watershed areas. In addition to the Aquifer Protection Ordinance, the town also carefully enforces a Stormwater Management Ordinance and Sedimentation and Erosion Control regulations.

Newton, NH: The Town of Newton is a small rural, bedroom community with a population of approximately 4,600. There is little commercial or industrial property to help defray the tax burden on resident property owners. There is one elementary and one middle school (the high school is in Kingston, NH). Newton has a Town Beach on Country Pond that is open only to Newton Residents, except for scheduled swim lessons that may include non-residents. We also have two campgrounds that are located on the pond with their own beach access.

Our Conservation Commission has actively worked with the public and the schools to educate them by providing workshops on how to protect wetlands, manure management and how to protect groundwater around their homes and along local roads. Like most small towns in New

Hampshire, our resources and maintaining consistent funding for even basic services is a challenge. In fact, we have failed to meet our budget needs in four of the last six years. Such a situation raises the stakes for every mandate contained in EPA's Draft MS4 Permit.

Plaistow, NH: The Town of Plaistow (population 8,000) has a strong legacy of environmental stewardship. Since our inception as a Town in 1749, the Town of Plaistow has supported the best of hometown values, unwavering patriotism, and dedicated citizenship. Over the years, Plaistow has seen the changes that have transformed our community from an agrarian economy to a regional center of transportation, education, and commerce. This evolution also has caused additional environmental challenges ranging from a Superfund site, remediating leaking underground petroleum storage tanks, and protecting vital local resources. But we have met those challenges head-on. In fact, in 2002, Plaistow was one of the first Towns in New Hampshire to implement a *Source Water Protection Plan.*

The nation's economic challenges have also had significant impact on Plaistow, which now has one of the highest unemployment rates in New Hampshire. We are not in a position to further burden our residents with unnecessary increased fees or taxes. During these challenging times, Plaistow received what it believes was an unjust and unfair EPA Administrative Order in 2009, which helps to symbolize the unfair challenges small towns have in trying to work responsibly with federal and state partners to ensure appropriate environmental protection. Plaistow would much rather receive help and assistance from EPA to strengthen our partnership through shared effort and responsibility, rather than a heavy-handed top-down approach that also seems to be prevalent in the Draft MS4 Permit.

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In sum, each of the Represented Towns fully supports environmental protection and providing a healthy and safe environment for its residents. They also recognize and support federal, state, and local efforts and initiatives to protect valuable water resources and ensure that they provide safe conditions for recreation, aquatic species, and other valuable needs, now and into the future. They recognize that the federal, state, and local partnerships are vital to providing a balanced environmental protection program for all of New Hampshire, New England, and the nation; however, they also firmly support the appropriate checks and balances built into these relationships that must be recognized and protected.

EPA Region 1's authority to develop and implement any MS4 permit is limited to the authorities granted to the federal government in the U.S. Constitution, and to EPA through specific delegation of certain powers that Congress sets forth in the Clean Water Act (and related statutes). While the goals of the Draft MS4 Permit are entirely laudable, many of its requirements and mandates encroach unnecessarily upon many state and local issues, in contravention of EPA's CWA authority. As described above, these towns have taken their own actions to protect local resources apart from any federal mandates. Hence, while the Represented Towns support environmental protection, they cannot support many of the provisions contained

in the Draft MS4 Permit that exceed EPA Region 1's authority to promulgate or that infringe on local land use control.

Summary of Key Aspects of Clean Water Act Stormwater Permitting

In 1987, Congress added section 402(p) to the Clean Water Act to resolve years of litigation and confusion regarding EPA's authority to require National Pollutant Discharge Elimination System ("NPDES") permits for discharges composed entirely of stormwater. 33 U.S.C. § 1342(p). Section 402(p)(1) essentially exempts most stormwater discharges from NPDES permitting requirements. Section 402(p)(2) lists several exceptions to that broad exemption, including stormwater discharges from industrial activity, discharges from large and medium MS4s (serving populations of 100,000 persons or greater), and other specific sources that permitting authorities may designate for permitting because they are significant contributors of pollutants to U.S. waters. The industrial and MS4 sources were considered "Phase I" sources.

Congress also provided a process for EPA to expand the NPDES stormwater program to other classes and categories of dischargers on a regional or national basis through studying those sources, reporting back to Congress, and promulgating new national regulations. *See* CWA Sections 402(p)(5)-(6). Pursuant to Section 402(p)(6), "the Administrator ...shall issue regulations....which designate stormwater discharges to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources." It is important to note that the CWA clarifies that the term "'discharge' when used without qualification includes a discharge of a pollutant and a discharge of pollutants." *See* CWA Section 502(16).[3]

Pursuant to CWA Sections 402(p)(5)-(6), EPA expanded the Phase I stormwater program to include smaller MS4s and to expand the construction stormwater program to include active land disturbing construction sites of greater than or equal to one acre. This action is referred to as EPA's "Phase II" stormwater program. But EPA's stormwater program expansion only includes additional point sources for NPDES permitting. EPA's CWA authority is still bound by the limitation that the NPDES permit program regulates the discharge of *pollutants* discharged from point sources to waters of the U.S.[4] *See Waterkeeper Alliance et al. v. EPA,* 399 F.3d 486 (2d Cir. 2005)("In other words, unless there is a 'discharge of any pollutant,' there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit.")

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[3] To further clarify and avoid any confusion regarding the limited scope Congress placed on the NPDES permitting program and authority, "[t]he term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." CWA Section 502(12)

[4] The NPDES permit program is necessitated by the Clean Water Act's general prohibition against the discharge of pollutants unless authorized by permit. CWA Section 301. The discharge of water (absent pollutants) is not prohibited.

When it expanded the MS4 permitting program through the Phase II program, EPA recognized that the new MS4 general permit program to be less onerous and more flexible than the Phase I MS4 permitting program. Thus, EPA established the "six minimum control measures" as the basis for its small MS4 permitting program.[5] EPA also has expressly stated its priority for using non-numeric effluent limitations in stormwater permits and to implement approved Total Maximum Daily Loads ("TMDL"). *See Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits* (www.epa.gov/npdes/pubs/swpol.pdf) ("1996 Interim Permitting Approach") and *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* (www.epa.gov/npdes/pubs/final-wwtmdl.pdf) ("TMDL/Stormwater Memo").[6]

The Draft MS4 Permit must be analyzed against these CWA authorities and EPA's own rulemakings and related guidance.

EPA's Proposed WQBELs Are Overly Burdensome and Unjustified

The Draft MS4 Permit contains unnecessarily complex and overly burdensome water quality-based effluent limitations ("WQBELs"). In fact, EPA arguably has turned the typical NPDES permit development and implementation processes on their head and shifted the bulk of the WQBEL responsibilities to the permittee. The Draft MS4 Permit Sections 2.1 and 2.2 set forth a far too complex, expensive, and unjustified process – particularly with the mandates contained in the Water Quality Response Plan ("WQRP") – that places the responsibility on the permittee (MS4 operator) to prove a negative; that the MS4 is not causing or contributing to a water quality violation. More typically, the permit writer is responsible for assessing and analyzing the nature of the permittee's discharge, reasonable potential to violate a water quality standard, and then to develop appropriate effluent limitations. *See* NPDES Permit Writers' Manual (http://cfpub.epa.gov/npdes/writermanual.cfm) at 6-1 *et seq.*

This exercise becomes even more difficult when the permittee attempts to use the EPA's or New Hampshire's water quality standards documents cited at Section 2.1.1(b). Neither of these standards regulations was developed for wet weather discharges, like those subject to the Draft MS4 Permit. Instead, they were derived for low-flow receiving stream conditions and continuous, steady-state discharge scenarios, neither of which is relevant to precipitation-related wet weather discharges, let alone snow melt. EPA raised this particular concern in its 1996 Interim Permitting Approach (at 6):

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[5] The minimum control measures are: Public Education and Outreach; Public Participation/Involvement; Illicit Discharge Detection and Elimination; Construction Site Runoff Control; Post-Construction Runoff Control; and Pollution Prevention/Good Housekeeping

[6] According to EPA's TMDL/Stormwater Memo: The policy outlined in this memorandum affirms the appropriateness of an iterative, adaptive management BMP approach, whereby permits include effluent limits (*e.g.*, a combination of structural and non-structural BMPs) that address stormwater discharges, implement mechanisms to evaluate the performance of such controls, and make adjustments (*i.e.*, more stringent controls or specific BMPs) as necessary to protect water quality.

> Potential problems of incorporating inappropriate numeric water quality-based effluent limitations rather than BMPs in storm water permits at this time are significant in some cases. Deriving numeric water quality-based effluent limitations for any NPDES permit without an adequate effluent characterization, or an adequate receiving water exposure assessment (which could include the use of dynamic modeling or continuous simulations) may result in the imposition of inappropriate numeric limitations on a discharge. Examples of this include the imposition of numeric water quality criteria as end-of-pipe limitations without properly accounting for the receiving water assimilation of the pollutant or failure to account for a mixing zone (if allowed by applicable State or Tribal WQS). This could lead to overly stringent permit requirements, and excessive and expensive controls on storm water discharges, not necessary to provide for attainment of WQS.

EPA's water quality standards approach contained in its Multi-Sector General Permit (2008)(http://cfpub.epa.gov/npdes/stormwater/msgp.cfm) adequately fixes and resolves this issue. In that general permit, EPA relies extensively on the implementation of technology-based controls to meet water quality-based requirements, but reserves the right to require the permittee to do more *if the permitting authority* can identify a particular need. As explained in the MSGP Fact Sheet (http://www.epa.gov/npdes/pubs/msgp2008_finalfs.pdf)(at 55):

> Each permittee is required to control its discharge as necessary to meet applicable water quality standards. EPA expects that compliance with the other conditions in this permit (e.g., the technology-based limits, corrective actions, etc.) will result in discharges that are controlled as necessary to meet applicable water quality standards. If the permittee becomes aware, or EPA determines, that the discharge causes or contributes to a water quality standards exceedance, corrective actions and EPA notification are required. In addition, at any time EPA may impose additional, more stringent WQBELs on a site-specific basis, or require an individual permit, if information suggests that the discharge is not controlled as necessary to meet applicable water quality standards.

That approach keeps the proper focus on the permitting authority to identify discharges that are causing water quality impacts, not the permittee to jump through hoops to prove that it is not causing such impacts. Obviously, well-drafted TMDLs with properly developed wasteload allocations could be directly applicable to MS4s within such watersheds (depending upon the specific requirements of the TMDL and discharges from the MS4), but the MSGP approach helps to address and resolve the other complexities associated with impaired waters without approved TMDLs. Once EPA approves a TMDL, it obviously is in the most appropriate situation to alert affected MS4s regarding its approval of a TMDL and its applicability to the MS4.

In the real world situations, these issues get even more complicated and EPA's prior efforts and guidance related to applying WQBELs to MS4 discharges reflect a much more flexible and iterative approach than the Draft MS4 Permit, which places unjust responsibility on the MS4 operator to prove a lack of impact rather than EPA identifying the impact. Hence, as proposed in the Draft MS4 Permit, EPA's approach to water quality standards compliance is arbitrary and capricious and overly burdensome. The Agency has not provided an adequate legal or technical basis for many (if not most) of the mandates contained in Sections 2.1 and 2.2. Conversely, EPA has successfully adopted a more simplified and rational approach to water quality compliance in its prior MSGP.

EPA's MEP Mandates Also Exceed Its Legal Authority

When Congress added Section 402(p) to the CWA in 1987, it differentiated the technology-based effluent limitations standard for MS4s relative to the rest of the NPDES permit program by creating a new standard called "maximum extent practicable" ("MEP"), as opposed to the more traditional BAT/BCT standard applied to industrial stormwater and other wastewater discharges. However, Congress did not specifically define the MEP standard. The essence of the MEP standard is explained best, perhaps, by EPA's *NPDES Permit Writer's Manual* (cited above) in its discussion of EPA's Phase II rulemaking and small MS4 program (at 2-9):

> Phase II of the stormwater program extended the NPDES permitting program to small MS4s in urbanized areas (64 FR 68722, December 8, 1999). The Phase II MS4 regulations require small MS4s to develop a program to address six *minimum control measures* that include BMPs and measurable goals for each BMP. Permit writers have the option of permitting regulated small MS4 operators using an individual permit, a general permit, or a modification of an existing Phase I MS4's individual permit (although the vast majority of small MS4s have been covered under general permits).
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> MEP is not precisely defined so as to allow maximum flexibility in MS4 permitting to optimize reductions in stormwater pollutants on a location-by-location basis (64 FR 68754, December 8, 1999). Therefore, permit writers must rely on application requirements specified in the regulations and the applicant's proposed management program when developing appropriate permit conditions. The stormwater Phase II rule was challenged in the courts, with the U.S. Court of Appeals for the Ninth Circuit generally upholding the Phase II rule but remanding three issues back to EPA. EPA issued guidance on April 16, 2004 for how new general permits should address the remanded issues of public availability of notices of intent (NOIs), opportunity for public hearings, and permitting authority reviews of NOIs....

The remanded portion generally is not relevant to these comments, recognizing that EPA Region 1 has adequately included appropriate public review and hearing opportunities. However, the Draft MS4 Permit's expansion of the basic six minimum control measures is

problematic and unjustified. EPA Region 1 has added extraneous and unjustified complexity to the MEP requirements, contravening the type of flexibility envisioned by EPA Headquarters' *NPDES Permit Writer's Manual* and raising significant legal concerns. Hence, the Draft MS4 Permit should be significantly curtailed and, if EPA Region 1 is so inclined, it should develop appropriate guidance documents to provide NH MS4s assistance with various methods for achieving the goals of the six minimum control measures. In fact, much of the excessive verbiage and discussion in the permit – and particularly the draft Fact Sheet (including the 2008 Fact Sheet) – read more like guidance than typical NPDES general permits.

Generally, the Represented Towns have few comments or objections to either the public education or public involvement aspects of the Draft MS4 Permit (Sections 2.3.2 or 2.3.3), other than to indicate that they could be set forth more concisely and EPA should ensure that it provides MS4 operators with maximum flexibility. EPA should review this section with affected stakeholders and consider changing the term "should" to "may" (or "should consider") when used in these sections. MS4 operators are sophisticated enough to manage appropriate public education and involvement programs that are tailored to their unique citizenry.

The Draft MS4 Permit's Illicit Discharge Detection and Elimination ("IDDE") program (Section 2.3.4) is overblown and unnecessary in its detail. Much of the Draft MS4 Permit language and related Fact Sheets (2008 and 2013) read like "guidance" and should be removed from the permit and, at EPA's discretion, developed as guidance for MS4 operators. There is absolutely no reason why EPA Region 1 cannot and should not adopt the same IDDE program set forth in the expired 2003 Small MS4 Permit for NH. The addition of specific dry weather inspections contained in the Draft MS4 Permit would help to enhance the 2003 permit terms, recognizing that dry weather visual inspections have proven to help MS4s to identify and address possible illicit discharges.

In its Fact Sheets, EPA Region 1 indicates that the expansion of the IDDE program is in response to lessons learned by the Clean Charles Initiative. But that initiative has no bearing and cannot possibly be used as an example for small New Hampshire MS4 operators. EPA's simple description on its website indicates that the initiative has taken almost 20 years to develop, includes far more participants (including with far more resources, such as the federal government) and credits the results of extensive litigation to achieve its ends. *See* http://www.epa.gov/region1/charles/initiative.html. To indiscriminately apply that type of program to small MS4s is arbitrary and capricious.

In addition, adding wet weather sampling represents a resource intensive and extravagant effort to find what amounts to a "needle in a haystack" – by searching for intermittent illicit discharges that otherwise do not show up in dry weather visual inspections – is to expand the small MS4 permit program into something that it cannot be at this point in its development. And, while entirely inappropriate for the Draft MS4 Permit, much of EPA's IDDE proposed program and Fact Sheet discussions might be valuable information for small MS4s to have access to through voluntary and informative guidance. Hence, the Represented Towns assert that EPA Region 1 should adopt a more simplistic IDDE program based on the 2003 permit. In

doing so and converting its excess to guidance, EPA will avoid the legal and technical problems associated with forcing inappropriate provisions into the permit.

The Draft MS4 Permit's construction stormwater provisions (Section 2.3.5) generally are consistent with the six minimum control measures intent. However, EPA Region 1 should note that EPA has proposed significant revisions to the Construction & Development Effluent Limitations Guidelines that will affect EPA's Construction General Permit ("CGP").[7] Hence, holding out the current CGP as a model must be accompanied by a disclaimer regarding changes to the BMPs and other provisions that underlie that permit. In addition, the 2008 Fact Sheet (at 51) discusses requirements for regulating materials "on" construction sites, and the Draft MS4 Permit implies requiring controls regarding activities and operations on the site. As illustrated in the *Federal Register* notice cited in the footnote on this page, EPA has no authority to regulate activities on a site, only those activities that lead directly to the discharge of pollutants from a point source to a water of the U.S.

The Draft MS4 Permit's Post Construction Stormwater Management mandates (Section 2.3.6) are illegal and exceed EPA's CWA authority. EPA cannot require any site to mirror the pre-development hydrology, control stormwater flow or volume absent pollutant discharges, or in any way regulate impervious surface through the NPDES permit program. The section appears to be based on a National Stormwater Rulemaking that EPA has been unable to even propose on a national basis, and its attempts to insert its unproven program into the Draft MS4 Permit is illegal and unreasonable. Until EPA can demonstrate its legal authority and economic justification for such mandates, it should not attempt to force them upon small New Hampshire MS4 operators. Further, as set forth above, any expansion of the stormwater program must follow the CWA Sections 402(p)(5)-(6) process, including a report to Congress. EPA has not yet completed any such process even though it has separately committed to doing so. This entire section must be redrafted.

Stormwater (*i.e.* precipitation leading to runoff) is not a "pollutant" under the CWA and, therefore, the flow of stormwater – in and of itself – cannot be regulated as a "pollutant" under the Act. Recently, the Eastern District of Virginia held just that. In *Virginia Department of Transportation et al. v. EPA*, the court held that the CWA did not confer authority to regulate stormwater flow because stormwater is not a "pollutant," under that term's statutory definition. 1:12-CV-775, at *5 (E.D. Va. Jan. 1, 2013) (*see* attached slip opinion). The court rejected EPA's argument that stormwater flow could be regulated as "proxy" or "surrogate" to effect levels of pollutants already present within a water body, though it may be appropriate, in different circumstances, to impose stormwater flow restrictions as a means to regulate specific pollutant levels demonstrated as being discharged within the same stormwater flow. *Id.* at *5-*6.

[7] The C&D ELG revisions were necessitated by litigation and EPA's subsequent admission that it had exceeded its authority in adopting certain provisions in its earlier ELG rulemaking. *See* 78 Fed. Reg. 19,434 (April 1, 2013) for EPA's discussion regarding the litigation history and reasons for revising its earlier C&D ELG. These issues are directly relevant to the Draft MS4 Permit.

Aspects of EPA's effort to regulate "flow" raise additional legal issues. In its efforts to regulate stormwater flow, EPA creates significant data collection and assessment burdens, and also mandates that the permittees impose a range of local land use restrictions, regardless of whether or not the permittees are the entities vested with the authority to do so under local law. EPA Region 1 wants to tell New Hampshire towns how to approve projects that include impervious surfaces (roads, parking lots, roofs, etc.), collect data, conduct assessments and file reports about land-use, attempting to force green infrastructure and other requirements that may not be appropriate for such towns.

The Supreme Court has repeatedly rejected finding federal authority under the CWA to go so far as to usurp the "quintessential state and local power" that is the "[r]egulation of land use." *Rapanos v. U.S.*, 547 U.S. 715, 738 (2006) (Scalia, J. plurality) (citations omitted). *See also Solid Waste Agency* v. *U.S. Army Corps of Eng'rs,* 531 U.S. 159, 174 (2001) (rejecting expansive reading of CWA jurisdiction because of "significant constitutional questions raised" by "impingement of the States' traditional and primary power over land and water use"). These cases turned on the interpretation of the jurisdictional phrases "the waters of the United States" and "navigable waters," and held that even by using those terms to broadly define the proper subject matter of federal jurisdiction under the CWA, Congress did not authorize federal regulators to supplant local land use decision-making. *Rapanos*, 547 U.S. at 738-39 ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase 'the waters of the United States' hardly qualifies." (citation omitted)); *Solid Waste Agency*, 531 U.S. at 174 ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation.").

The net result of this section of the Draft MS4 Permit is to impose *actual* federal regulation of land use in small New Hampshire towns. The NPDES permitting program is bound by its focus on the "discharge of pollutants," a term that is statutorily defined as the "addition of any pollutant to navigable waters." 33. U.S.C. § 1362(12). Thus, the NPDES permitting program is – as it must be – directly limited in its reach by the jurisdictional limits applicable to the CWA as a whole, which bar the federal regulation of local land use.

EPA's efforts to regulate impervious surfaces also raise legal issues about whether such surfaces actually qualify as "point sources" under the NPDES permit program. Impervious surface, on its own, cannot be subject to regulation under the NPDES permit program because impervious surface is neither a point source nor a pollutant. Rather, it is a feature of the landscape that indirectly influences how water is carried on and off the land. Congress predicated the stormwater permitting program in CWA Section 402(p) on point source discharges of pollutants from certain categories of dischargers, including MS4s and industrial activities.

Congress defined "point source" to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other

floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Impervious surfaces such as roofs, parking lots, and roads clearly are not point sources. Impervious surfaces do not channelize water. Instead, sheet flow that travels across impervious surfaces is considered non-point runoff, which is not regulated under the stormwater permitting program or subject to enforceable wasteload allocations under the TMDL program.

If EPA now interprets "point source" to include impervious surfaces, it renders that term meaningless and clearly contradicts Congressional intent to define the term and differentiate "point sources" from "non-point sources." As noted by the Second Circuit Court of Appeals, "the phrase 'discernible, confined, and discrete conveyance' cannot be interpreted so broadly as to read the point source requirement out of the statute." *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009). Such a broad interpretation would be contrary to the structure of the CWA. The Act defines the term "point source," and all other flows of water are nonpoint sources, the regulation of which is left to the states. *Id.* at 219-220.

EPA's NPDES regulations define the extent to which surface runoff can in certain circumstances constitute point source pollution. The definition of "Discharge of a pollutant" includes "additions of pollutants into waters of the United States from: surface runoff *which is collected or channeled by man.*" 40 CFR § 122.2 (emphasis added). By implication, surface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and consequentially is not subject to the CWA permit requirement. *See Hardy v. N.Y. City Health & Hosps. Corp.*, 164 F.3d 789, 794 (2d Cir.1999) (relying on "the familiar principle of *expressio unius est exclusio alterius,* the mention of one thing implies the exclusion of the other").

Note also that for many of these same reasons, the Draft MS4 Permit's requirements related to ground water recharge and infiltration (Section 3.1) also exceed EPA's authority. Again, this is not to say that the four Represented Towns objects to certain of these environmental controls and the resulting benefits; in fact they have passed similar ordinances without being mandated by EPA. But the key issue is that individual towns or the State of New Hampshire (if appropriate) take responsibility for determining their own appropriate controls to achieve their ends using their own legal mechanisms that are different from and independent of the Clean Water Act. Conversely, EPA's Draft MS4 Permit represents an ill-conceived attempt to mandate these practices through the heavy-handed NPDES permit program, where no authority for such mandates exists.

In similar fashion to other aspects of the Draft MS4 Permit, EPA Region 1 has expanded the Good Housekeeping and Pollution Prevention section (2.3.7) well beyond what is necessary. To the extent that the Draft MS4 Permit does not focus on the discharge of pollutants from point sources to waters of the U.S., many of those provisions are not justified. This section is rife with mandates for how to operate or conduct activities "on site" and EPA has not taken the necessary steps to focus on the nature of the pollutant discharges and how its mandates reduce site discharges.

All of EPA's efforts to unnecessarily expand the requirements in the 2003 MS4 Permit also significantly add cost to permit implementation. EPA Region 1 admits that permit compliance will require a "substantial investment" of limited town resources. *See* draft 2013 Fact Sheet at 148 *et. seq*. The Represented Towns' limited resources are derived mainly from property taxes, which EPA admits does not provide a consistent source of funding for MS4 implementation. *Id.* Attachment 1 at 30. EPA's simple response to the problems facing such NH municipalities is for them to develop a stormwater utility to further extract fees from town residents or to bring enforcement actions with significant penalties for illicit discharges into the MS4. *See id.* at 148-160 (discussion regarding stormwater utilities) *and* 82 (use of enforcement to fund MS4 compliance).

But EPA's responses to comments and suggested solutions fail to reflect any real understanding regarding these towns' real world economics or revenue generating options to cover the extraneous mandates in the Draft MS4 Permit. The proper response is for EPA to conduct a more comprehensive cost-benefit analysis, significantly pare back the mandates contained in the draft permit, and add more flexible compliance approaches for the permittees. As discussed below, we believe a more interactive approach to mandates, costs, and identifying alternatives that are more efficient and effective are mandated by the Unfunded Mandates Reform Act.[8]

Our informal coalition of New Hampshire towns would be willing to sit down with EPA Region 1 staff and walk through specific concerns in this section (and other sections) of the Draft M34 Permit to ensure they are properly based on EPA's CWA authority and are set forth in the most efficient and effective manner.

Regulatory Flexibility and Unfunded Mandates Reform Acts

Finally, the February 12, 2013 *Federal Register* notice regarding the availability of the Draft MS4 Permit states that the Regulatory Flexibility Act and Unfunded Mandates Reform Act requirements do not apply to NPDES general permits. EPA Region 1's position on complying with those statutes is undermined not only by the law itself but also by EPA Headquarters policies and public statements. Even if there was any doubt by EPA Region 1's General Counsel regarding its legal position, it should comply with the spirit of and intent Congress set forth in those Acts. But, there is little doubt that such laws apply and EPA Region 1 must rectify its oversight.

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[8] EPA's website summarizes its responsibilities under Section 203 of the UMRA as follows: "Section 203 of UMRA applies to *all* regulatory requirements that might significantly or uniquely affect small governments. Before establishing a requirement that might significantly or uniquely affect small governments, §203 requires federal agencies to develop a plan to: provide notice of the requirements to potentially affected small governments; enable officials of small governments to provide meaningful and timely input for any proposal containing significant federal intergovernmental mandates; and inform, educate, and advise small governments on compliance with the requirements." http://www2.epa.gov/laws-regulations/summary-unfunded-mandates-reform-act (emphasis in original). We assert that EPA has not met this standard for the Represented Towns.

The Small Business Administration Office of Advocacy is charged, in part, with ensuring that federal agencies comply with the RFA. In 2006, SBA Advocacy filed comments on EPA's proposed MSGP, providing a legal analysis for why EPA's general permits are, in fact, subject to the RFA. *See* SBA Advocacy's March 14, 2006 comments letter to EPA (http://www.sba.gov/sites/default/files/files/epa06_0314.pdf) at 2. The same logic would apply to the UMRA. In response, EPA provided a detailed discussion regarding its past legal analyses and intervening case law in its final MSGP *Federal Register* notice. *See* 73 Fed. Reg. at 56, 577 (Sept. 29, 2008). EPA ultimately concluded and committed to the following:

> EPA hereby commits that the Agency will operate in accordance with the RFA's framework and requirements during the Agency's issuance of CWA general permits (in other words, the Agency commits that it will apply the RFA in its issuance of general permits as if those permits do qualify as ''rules'' that are subject to the RFA). In satisfaction of this commitment, during the course of this MSGP permitting proceeding, the Agency conducted the analysis and made the appropriate determinations that are called for by the RFA. In addition, and in satisfaction of the Agency's commitment, *EPA will apply the RFA's framework and requirements in any future MSGP proceeding as well as in the Agency's issuance of other NPDES general permits.* (emphasis added)

EPA Region 1's contrary approach is unjust. Instead, EPA Region 1 should recognize the substantial impact on a significant number of small New Hampshire towns and convene a meeting to address both the RFA and UMRA obligations.

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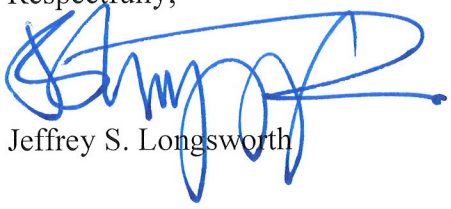
On behalf of the Represented Towns, we appreciate the opportunity to comment on EPA Region 1's Draft MS4 Permit. If you have any questions or would like to discuss these comments further, please contact me directly. I also can arrange a meeting of the Represented Towns and EPA Region 1 to further discuss the issues before EPA Region 1 finalizes its small MS4 general permit.

Respectfully,



Jeffrey S. Longsworth

Cc: Sumner Kalman, Attorney at Law, PC
Town Representatives for Atkinson, Kingston, Newton, and Plaistow, NH